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**Supreme Court of the United States**

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**No. 77-1313**

**October Term, 1977**

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**LELA ENSOR BAILEY,**  
*Petitioner,*

**vs.**

**J. W. STREET,**  
*Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SIXTH CIRCUIT**

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**BRIEF OF J. W. STREET, RESPONDENT, IN  
OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

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### BRIEF OF J. W. STREET, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent submits this Brief in Opposition to a Petition for a Writ of Certiorari filed March 18, 1978. The Petition seeks a review of a decision of the United States Court of Appeals for the Sixth Circuit dated January 13, 1978. That decision affirmed an order of the United States District Court for the Eastern District of Tennessee dismissing respondent's case on the grounds of *res judicata* and there is no reason for further review by this Court.

### QUESTION PRESENTED

Is the final judgment in the State case in which the parties are the same and the subject matter is the same, *res judicata* as to this action?

The District Court<sup>1</sup> and the Court of Appeals<sup>2</sup> answered the foregoing question "yes." Respondent says that they should have answered the question "yes."

### COUNTER-STATEMENT OF THE CASE

This is an action filed in the United States District Court for the Eastern District of Tennessee, on January 5, 1796, to recover money damages by reason of the alleged deprivation by the respondent of petitioner's Civil Rights, 42 U.S.C. §1983. The Court's jurisdiction was invoked under 28 U.S.C. §1343(3) and also by reason of alleged diversity under 28 U.S.C. §1332(a) (1).

The respondent moved for dismissal for lack of the Court's jurisdiction, Rule 12(b) (1), Federal Rules of Civil Procedure and for the failure of the petitioner to state a claim upon which relief can be granted, Rule 12(b) (6), or in the alternative, for summary judgment, Rule 56(b), Federal Rules of Civil Procedure.

District Court Judge Neese pretermitted the jurisdictional question and the defense of immunity and sustained the Motion to Dismiss for failure to state a claim on the ground that this action was barred by reason of *res judicata*.<sup>3</sup>

1. Petitioner's Brief—Addendum, page 25.
2. Petitioner's Brief—Addendum, page 22.
3. Petitioner's Brief—Addendum, page 25.

An appeal was taken by the petitioner-appellant to the Court of Appeals and in petitioner's brief, counsel, in his statement of the issues presented, limited same to the alleged error of the District Court in sustaining respondent's Motion to Dismiss on the principles of *res judicata*.

### Res Judicata

One of the grounds relied on by the respondent herein in support of his Motion to Dismiss or for Summary Judgment is that petitioner's action herein is barred on the ground of *res judicata*.

The record discloses that petitioner was the owner of an interest in a house and lot in Carter County, Tennessee; that J. W. Street, Superintendent of Roads for Carter County, acting under the authority and on behalf of Carter County, in his official capacity, reconstructed a bridge across a creek near the petitioner's property and as a consequence, it is alleged that said bridge diverted water onto petitioner's property, to their damage.

Whereupon, said property owners brought suit "for damages in the ordinary way"<sup>4</sup> against J. W. Street, Superintendent of Roads for Carter County, seeking to recover damages against Carter County for the alleged appropriation of their property, *real and personal*<sup>5</sup> (emphasis ours).

After a jury trial, the jury reached a verdict in favor of the petitioners and did "fix their damages and compensation at \$1,500.00."<sup>6</sup>

4. Tennessee Code Annotated 23-1423 Addendum to Respondent's Brief, page 13.

5. Excerpts from State Court Complaint, Addendum page 13.

6. Excerpts from State Court Judgment, Addendum page 14.



No appeal was prayed or granted, the time for appeal has expired and judgment became final and it is so stipulated by petitioner's counsel.

## ARGUMENT

### **Res Judicata**

The District Court predicated its action insustaining respondent's motion to dismiss on the defense of res judicata.

The Court properly held that the parties are the same, that the subject matter was the same, and the judgment of the State Court was final and accordingly the doctrine of res judicata applied. The Court of Appeals affirmed.

### **Parties**

The parties are the same.

In the State Court action, Lela Ensor Bailey, petitioner herein, and her sister, who owned a one-fourth interest in the property, were plaintiffs and the named defendants were J. W. Street, Road Superintendent for Carter County, and Carter County, Tennessee. In the instant action, the suit was filed by Lela Ensor Bailey against J. W. Street.

In the complaint, Section III, it is alleged that he is the duly elected Superintendent of Roads of Carter County, Tennessee, has been since 1959, "and all acts herein ascribed to him, and upon which civil liability by him to the plaintiff is predicated, were performed and done by him under color of the statutory or other law of the State of Tennessee and while acting as Superintendent of Roads of Carter County, Tennessee, and all acts herein alleged to have been done by him were so done under the authority and color of his office as Superintendent of Roads."

From the allegations of the complaint, the respondent Street, as an agent and representative of the County and as a named respondent, in his official capacity in the State case, was in privity with the County. In fact, the petitioner, in her brief, in effect concedes that Carter County and J. W. Street were privies.<sup>7</sup>

### **The Subject Matter Is the Same**

The petitioner herein and her sister, co-owners of the property involved, brought a civil action in the State Court against the respondent herein as Superintendent of Roads of Carter County, and Carter County, Tennessee, on July 23, 1974, seeking to recover damages for the alleged appropriation of "both real and personal property" of the petitioners alleging in substance that their property had been taken and appropriated by the County by reason of construction of a bridge across Stoney Creek adjacent to their property, causing water, at flood time, to be diverted onto their property, damaging the residence and personal property therein.

The petitioner bases this action upon the provisions of T.C.A. 23-1423, which provides that when property has been taken and occupied for purposes of internal improvement, that the owner may initiate an action by a proceeding sometimes referred to as "inverse condemnation" or he may sue for damages in the ordinary way."<sup>8</sup>

The State action was brought under the second remedy or as a suit for damages in the ordinary way.

In *Scott v. Roane County*, 478 S.W.2d 886, in an opinion by the Supreme Court of Tennessee, the Court said:

7. Petitioner's brief, page 8.

8. Addendum, Tennessee Code Annotated 23-1423, page 13.

"The Statute 23-1423 should be read as allowing two distinct actions. The first being an inverse or reverse condemnation action and the second being a suit for damages in the ordinary way."

In the State Court action it is stated that petitioners file their complaint as an inverse condemnation case seeking to recover damages for the taking of real and personal property.<sup>9</sup>

They do not ask for a jury of view, but pursue the case as an ordinary damage case.

In *Scott (supra)*, the same procedure was followed and the Court classified the action as follows:

"From these pleadings it is clear the plaintiff was seeking relief under the second remedy or *an action for damages in the ordinary way.*" (Emphasis ours.)

Petitioner insists that she could not and did not recover for damages to the personal property in the residence.

1. Because the State action was based upon facts occurring prior to its filing; and

2. Because under Section T.C.A. 23-1423, no recovery could be had for the taking of personal property.

She states that she was prevented from litigating this issue in the State Court because of Tennessee law, but fails to cite any authority in support of this statement.<sup>10</sup>

The record discloses that in the action, petitioners sought to recover for damages to the real and personal property and the verdict of the jury and the judgment of the Court show they "find the issue in favor of the

9. Addendum, Excerpts from Complaint, page 13.

10. Petitioner's Brief, page 16.

plaintiffs and fix their damages and compensation at \$1,500.00."

This was a general verdict and embraced every issue joined, including damages to personalty and compensation for the taking.<sup>11</sup>

We interpret the word "damages" as meaning damages to the personal property, and "compensation" as being for damages for the taking.

The judgment of the Court was that the petitioners recover from Carter County the sum of Fifteen Hundred Dollars (\$1,500.00) "as and for all damages and incidental damages, and compensation for a flowage easement over plaintiffs' land taken in manner as alleged in the complaint as amended \* \* \*."<sup>12</sup>

### **The Judgment Is on the Merits and Is Final**

If the petitioner had been dissatisfied with the judgment in the State Court, which was on the merits, there was nothing to prevent her from taking an appeal; however, she elected not so to do and the judgment became final. It is conceded by petitioner's counsel that no appeal was taken and said judgment is final.

### **The Law**

In *Grubb v. Public Utilities Commission*, 281 U.S. 470-479, 74 L. Ed. 972-979, the Supreme Court of the United States held as follows:

"that a judgment upon the merits in one suit is res judicata in another where the parties and subject

11. Tennessee Code Annotated 20-1318, Addendum, page 13.

12. Excerpts from Judgment—Addendum, page 14.

matter are the same not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end."

To the same effect see *Deane Hill Country Club, Inc. v. City of Knoxville, et al.*, 379 F.2d 321 (1967), cert. denied, 389 U.S. 975, 19 L. Ed. 2d 467.

Both of the above cases are cited in the opinion of the District Court.

### **Federal Action As an Appeal From State Judgment**

Petitioner is now attempting to effect an appeal from the judgment of the State Court, which she did not take when she had an opportunity so to do, and to relitigate her alleged grievances in a Federal Court. As stated in *Jones v. Township of North Bergen*, 331 F. Supp. 1281 (1971):

"This case is another example of increasing prevalence of the mistaken notion that it is more advantageous to litigants to have their grievances litigated in a federal court under color of some provision of the United States Constitution or the Civil Rights Act. Ingenuity in framing allegations to bring litigation across the federal threshold and by-pass State courts has been energetically employed. The burden cast upon federal district courts by matters for which the State provides appropriate and competent tribunals is becoming tremendously heavy."

To the same effect see *Coogan v. Cincinnati Bar Association*, 421 F.2d 1209 at 1211 (6th Cir. 1970), wherein the Court said:



"The Civil Rights Act was not designed to be used as a substitute for the right appeal, or to collaterally attack a final judgment of the highest court of the state and relitigate the issues which it decided.

The final judgment of the Supreme Court is conclusive and Coogan is precluded by the doctrine of res judicata from relitigating not only the issues which were actually involved in the disbarment proceeding, but also the issues which he might have presented. *Burton, Inc. v. Durkee*, 162 Ohio St. 433, 438, 123 N.E. 2d 432 (1954)."

In *Cheatham v. Carter County*, 363 F.2d 582, 4 A.L.R. F. 226, land was sought to be condemned by Carter County, the record owner being the only defendant named, which defendant had previously contracted to sell the property sought to be acquired to non-resident owners. Whereupon the record owner disclaimed any interest in the land and sought to be dismissed from the condemnation action. The owners of the equitable interest later perfected into a fee by the execution of a deed by the record owner instituted an in personam action in the United States District Court for the Eastern District of Tennessee seeking to recover the value of the land taken, Carter County, condemnor, having taken actual possession of the land.

The District Court dismissed the complaint characterizing plaintiff's action as a "reverse condemnation proceeding" and held that under T.C.A. 23-1423 such an action is limited to situations where there has been a taking without benefit of formal condemnation proceeding. On appeal, the Court held that the landowner's action in the United States District Court was one for damages against the defendant for taking of their property without compensation, such an action being authorized by the above Code

section wherein it is provided "or he may sue for damages in the ordinary way \* \* \*," citing cases.

### Pretermitted Defenses

1. Petitioner's claim under the Civil Rights Act is that she had:

a. Been deprived of due process under the Fourth, Fifth and Fourteenth Amendment to the Constitution.

b. Her property had been taken without just compensation; and

c. She had been discriminated against and subjected to unreasonable search and seizure, all in violation of her Constitutional rights.

However, she has failed to point wherein she has been discriminated against. She has had access to both the Chancery and Law Courts of Carter County and recovered all damages, including incidental damages, which, of course, would include damages to personal property alleged to have been sustained by her.

The Complaint is lacking in any allegations other than the conclusions of the pleader, which would bring her claim under the "Civil Rights Act" and thereby confer jurisdiction.

### CONCLUSION

For reasons given in the District Court's Opinion and in the Opinion of the Court of Appeals said Courts reached the proper conclusion. Further review by this Court is unwarranted.



It is, therefore, respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## **ADDENDUM**

### **STATE STATUTE CITED**

#### **Tennessee Code Annotated, §23-1423**

23-1423. Action initiated by owner. -If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way, in which case the jury shall lay off the land in metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest. [Code 1858 §1347; Shan., §1866; Code 1932, §3131; Acts 1972 (Adj. S.), ch. 463 §3.]

#### **Tennessee Code Annotated, §20-1318**

20-1318. Scope of general verdict. -A general verdict, although it may not in terms answer every issue joined, is nevertheless held to embrace every issue, unless exception is taken at the term at which the verdict is rendered. [Code 1858, §4247 (deriv. Acts 1851-1852, ch. 152, §4); Shan., §6085; Code 1932, §10348.]

#### **Excerpts From State Court Complaint**

VIII. The taking of plaintiffs' said property and the inflicting of irreparable damages upon plaintiff's real and personal property in the house \* \* \* and thereby inflicting irreparable damage to plaintiff's house and land and the household furniture, appliances and personal property in the house to the extent of \$20,000.00.

**Excerpts From State Court Judgment**

**IT IS, THEREFORE, ORDERED, ADJUDGED, AND  
DECREED BY THE COURT:**

1. That the plaintiffs have and recover of defendant Carter County, Tennessee the sum of \$1500.00 as and for all damages and incidental damages, and compensation for a flowage easement over plaintiffs' land taken in manner as alleged in the complaint as amended, and the costs of the cause are taxed to defendant Carter County, and for all of which execution will issue.